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Recommended Citation

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IN THE SUPREME COURT
of the
STATE OF ILLINOIS

FILED
SEP 1 1963
Clerk, Supreme Court, Ill.

EDNA A. CHRISTENSEN,
Plaintiff and Appellant,

v

Case No. 8,017

BERNARD MUMFORD, et al.,
Defendants and Respondents.

APPELLANT'S BRIEF

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IN THE SUPREME COURT
of the
STATE OF UTAH.

EMMA A. CHRISTENSEN,
Plaintiff and appellant,

v.

Case No. 8,017.

BERNARD MUNSTER, et al.,
Defendants and respondents.

APPELLANT'S BRIEF.

STATEMENT OF FACTS

This is the ordinary action to determine adverse claims to a tract of land in Millard County, to which plaintiff holds the record title, and which is in the possession of defendant Bernard Munster [hereinafter referred to as defendant] under a void tax title.

the evidence, the matters on which this appeal is based being sufficiently shown in the findings of fact, (7.0-12)

Plaintiff acquired the property in the year 1932 subject to taxes for the years 1934-1935, at which time there was outstanding a certificate of sale for taxes for the year 1934, which sale was void by reason of the lack of the auditor's affidavit. Tax deed issued to the county in the year 1936, and on December 22, 1943, the county contracted to sell the property, on installment payments to defendant, who thereupon entered into possession and used the same for grazing purposes continuously up to the trial, it having a value for that purpose of from \$25 to \$50 per year. (7.0) Beginning with the year 1943 the land was each year assessed in the name of said defendant, who paid all taxes thereon, FIRST FOR THE YEARS 1943, when, on October 13, 1943 they were paid by plaintiff. (8.10) Subsequently on November 27, said defendant, presumably having tax notices therefor, made payment of taxes on several parcels assessed in his name, including the parcel in controversy on which plaintiff

and mailed to defendant his check for the second payment on the parcel involved, which defendant declined to accept, and returned to the treasurer. In 1946 plaintiff tendered the tax for that year to the treasurer, who refused to accept it. It does not appear that any further tender was made. Presumably the plaintiff realized it would be useless. Upon this state of facts the lower court held that defendant had "paid all taxes for seven consecutive years," had acquired title by adverse possession, and quieted title in him.

STATEMENT OF POINTS.

The lower court erred in holding that the payment by defendant on November 27, 1948, after the tax on the property had been paid and acquiesced by plaintiff on October 12, was a "payment of tax," that defendant's adverse possession was not interrupted thereby, and that he had acquired title by adverse possession.

ARGUMENT.

It is plaintiff's contention that title by adverse possession can be acquired only by such continuous possession for the full period of seven years, coupled with the payment of taxes for each of such years and that until that has occurred the owner may interrupt such adverse either by entering into possession, bringing action, or by payment of taxes, and that when she paid the tax in October 15, 1906, the tax for that year was extinguished, that there was then no tax that could be paid by defendant, and his payment of an amount equal to the tax which had previously been paid, was a mere gratuity; and the decision of the court, now to be held.

Before entering upon a discussion of the decision it may be noted that the statutes relating to payment of taxes as a condition to acquiring title by limitation fall into two classes. Those relating to actual possession which require the payment of all taxes lawfully levied and assessed; and those which in effect provide that payment of taxes upon unoccupied

uninclosed land by one holding color of title thereto shall give constructive possession. There are importances, but they do not affect the question involved in this action. In the case of actual possession the period runs from date when possession is first taken, and if no taxes are assessed in any year, the nonpayment of taxes for such year does not ^{defeat} the adverse possession. In the matter of unoccupied uninclosed land, the period does not commence until the date of the first payment of taxes which initiates the constructive possession, and if in any one year there be no tax lawfully assessed, there can be no constructive possession for such year, and the constructive possession is broken. But in either case, the first payment of the tax, whether by the owner or by the adverse claimant, extinguishes it, and an attempted second payment will avail nothing. There cannot be a "payment" in the absence of an existing liability or demand.

So far as we have observed there seem to be but few states in which the courts have considered the effect of "double payment" of taxes in relation to adverse possession; Illinois, California, Arkansas and

and Miller. And it is only in California that we can find any statement that the order of payment is immaterial, that though the owner may have discharged the tax, a second payment by the adverse claimant will be effective even in that state there is a conflict in the decisions, and apparently there is no decision in which it is certain that such statement is more than a fiction, that in any case it affirmatively appears that a first payment was made by the owner.

At an early date the Illinois court said, regarding a "double payment" of tax:

"From the moment that payment was made, there were no taxes in existence legally assessed for that year. The money existed, but its payment extinguished and discharged the tax, and when Cushman, in April following, paid an amount of money to the collector, corresponding in amount to the tax which had previously existed against the land, it was not in payment of the tax, because that had already been paid and had ceased to exist. There was at that time no tax legally assessed against the land, and his payment was not of a tax legally assessed, but it only amounted to a gratuity to the state, county, etc., which had no claim, and consequently no payment could be made to them or their officers. To constitute a payment, the money must be given in discharge of a debt, demand, assessment or public charge, neither of which existed at the time Cushman gave this money to the collector."

"Under this section the owner of land may defeat the right of the holder of 'claim and color of title' by the institution of suit at any time within the seven years, or by the payment of taxes for any one of the seven years, or by entry and taking possession before the creation of the statutory bar, and before the holder has taken possession." (Syl.3)

Stearns v. Cittings, 23 Ill. 332.

"The party holding the legal title, having paid the taxes, the party claiming color of title can not, by paying a like amount of the taxes that existed against the property, obtain the benefit of the statute to aid his title. In this instance, when the guardian paid the respective amounts to the collector, there were no taxes due for those years on the property for the reason that the same had been discharged by the holder of the legal title previous to the dates of his payments."

Rees v. Coit, 58 Ill. 53 (56)

"If in any single year plaintiff paid the taxes, and afterwards Stevens paid the amount of the taxes on the same land, he would not have paid the taxes for that year, they would have been paid by plaintiff."

Bolden v. Sherman, 101 Ill. 463 (469).

"Defense of seven years possession and payment of taxes under a quitclaim deed is not made out where the payments were, in certain instances, after payment by the owner." (Syl.7)

Maher v. Brown, 50 N.E.161, 183 Ill.575.

"As soon as payment of the taxes thereon was made by Feig, the same were satisfied and discharged, and the subsequent payment thereof by Clayton could avail him nothing."

Clayton v. Feig, 59 N.E.245 (246) 188 Ill.603.

First payment of tax by anyone discharges tax.
Osborne v. Searles, 40 N.E.452, 136 Ill.83.

Even though the payment be refunded.
Iowa Nat Land Co. v. Guthrie, 33 Ia. 383.
Mason v. Chicago, 48 Ill. 420.

"The owner of the land appears first as having paid the taxes, and the payment by him extinguished the tax lien of the state; and in no sense could it be said that the payment by the Bradley Lumber Company, after the taxes had been paid by the owner of the land, gave it title to the land by continuous payment of taxes under color of title for seven consecutive years."

Southern Lumber Co. v. Arkansas Lumber Co.,
 4 S.W.2d 228, 928 (931) 176 Ark. 906;

" . . . Where record owner is first in point of time, and two annual payments are made, first payment has effect of extinguishing tax lien and payment by tax title holder after taxes are paid by record owner cannot give him title to the land."

Burbridge v. Bradley Lumber Co., (Syl.5)
 215 S.W.2d 710, 214 Ark.135.

As the California decisions are the only ones tending to support the judgment of the lower court, we will leave it to respondent to discuss them and to show, if he can that the statements made in some of them that the order of payment is immaterial, whether the first payment be by the owner or by the adverse claimant is other than a dictum, that in any of them

The Idaho court, in a dissent, covers the view
contended for by plaintiff.
~~contended for by plaintiff. The court said the same rule~~

The court says:

"Sometimes one party has paid the taxes first and
other years the other party has been the first to make
payment. It is not material that we determine the rule
of law which should apply in such cases. It seems, how-
ever, to us that the rule announced by Mr. Justice Brandeis
in his concurring opinion in *Granger v. Johnson*, 98 U.S. 672, 11 Minn. 440, 309, is the correct
rule to be applied in such cases. The same rule was
adopted and followed in *Carpenter v. Lewis*, 119 Cal. 15,
30 Pac. 925."

Granger v. Walker, 139 P. 1007, 23 Id. 493.

The requirement that in order to acquire a title by
adverse possession one must have paid all taxes legally
assessed upon the land, in part at least, for the
protection of the owner. It is thus stated by a Cal-
ifornia court:

"In acquiring title by this method, the law
requires taxes to be paid. This safeguard is
very important as affording a definite kind of
notice, particularly to nonresident owners,
that someone is paying their taxes and there-
fore probably trying to obtain their land by
hold and persistent trespass."

Cal. Pac. Land Co. v. Jordan Co.,
13 Cal. 2d, 122 Cal App. 720.

for that year that the subsequent attempted payment by defendant availed nothing, as there was then no existing tax that could be paid.

Should the judgment of the lower court be affirmed and the rule established that an adverse claimant, notwithstanding payment of taxes by the owner, may by virtue of a second payment establish title by adverse possession, there would be no protection for the nonresident owner, for it requires little to establish possession of lands of this character (*Adams v. Lamico*, 221 P.2d 1037), and even though the adverse claimant had no color of title, it would be easy for ~~him~~ him to testify and difficult if not impossible for the owner to disprove, that he had grazed every portion of the property. It is not at all probable that the treasurer would, even if he had the authority, refuse to accept the second payment from a fellow citizen seeking to establish title by adverse possession,, nor that the owner, who had already performed his full civic duty in the payment of taxes, would be advised that a second payment had been made thereon.

to submit that the judgment of the lower court
is erroneous and should be reversed and the cause remanded
with directions to enter a judgment for plaintiff, subject
to the right of the defendant to establish and foreclose
any claim he may be entitled to under the provisions of
Chapter 30, Laws of Utah, 1911.

Respectfully submitted,

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